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In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANTS

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Congress may constitutionally prohibit indecent as well as obscene interstate commercial telephone messages, as it did in Section 223(b) of the Communications Act of 1934, as amended in 1988 (to be codified at 47 U.S.C. 223(b)).

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra,* 1a-6a) is not yet reported.

JURISDICTION

The preliminary injunction (App., *infra,* 7a-8a) was issued by the district court on July 19, 1988. A notice of appeal to this Court (App., *infra,* 9a-10a) was filed on July 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[1]

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[1] Pursuant to the Act of June 27, 1988, Pub. L. No. 100-352, § 1, 102 Stat. 662, which was signed by the President on June 27, 1988, Section 1252 was repealed effective September 25, 1988 (§ 7, 102 Stat. 664).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech * * *."

Section 223(b) of the Communications Act of 1934, as amended effective July 1, 1988, by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 424 (to be codified at 47 U.S.C. 223(b)), provides:

> (b)(1) Whoever knowingly—
>
> (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),
>
> shall be fined not more than $50,000 or imprisoned not more than six months, or both.
>
> (2) In addition to the penalties under paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

The repeal does not affect this case, as it does "not apply to cases pending in the Supreme Court on the effective date * * * or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date" (*ibid.*).

(3)(A) In addition to the penalties under paragraphs (1) and (2), whoever, in the District of Columbia or in interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either –

(i) by a court, pursuant to a civil action by the [Federal Communications] Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(4) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

STATEMENT

In 1988, Congress amended Section 223(b) of the Communications Act of 1934, 47 U.S.C. (& Supp. III) 223(b), to prohibit indecent as well as obscene interstate commercial telephone messages. Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 424. Appellee, a company that provides so-called "dial-a-porn" telephone services, brought this action challenging amended Section 223(b) as unconstitutonal, chiefly under the First Amendment. The district court denied

appellee's request for a preliminary injunction against enforcement of the statute's ban on obscene telephone messages. The court issued the requested preliminary injunction, however, against enforcement of the statute's ban on indecent telephone messages.

1. The statute at issue in this case is the most recent result of Congress's efforts to protect children against so-called "dial-a-porn"—that is, sexually explicit or suggestive messages, typically prerecorded, that are provided for a fee over the telephone. See 134 Cong. Rec. S4377 (daily ed. Apr. 20, 1988). A provider of dial-a-porn messages arranges with a telephone company to use special telephone lines, typically though not always with the prefix "976," that are designed to handle large numbers of calls simultaneously. See *Carlin Communications, Inc.* v. *FCC*, 787 F.2d 846, 850-851 (2d Cir. 1986) (*Carlin II*). The telephone company typically charges callers according to prescribed tariffs, retains a portion of the charges, and remits the remainder to the dial-a-porn company. See *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order*, 2 F.C.C. Rcd 2714, 2715 (1987) (*Third Report*).[2]

Recorded dial-a-porn messages, which the purveyors can and often do change at least once a day, contain a wide range of explicit descriptions of sexual acts. The record in this case, for example, shows that callers to the

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[2] Other dial-a-porn companies, unlike the appellee in this case, provide live, "two-way" sex conversations with persons calling a specified number and providing a credit card number for payment. See 2 F.C.C. Rcd at 2715. This form of dial-a-porn service is at issue in *Roe* v. *Meese*, 689 F.Supp. 344 (S.D.N.Y. 1988) (granting preliminary injunction against Section 223(b)'s prohibition of indecent speech, but refusing preliminary injunction against section's prohibition of obscene speech).

service provided by appellee's affiliate could hear recorded messages describing a woman having sex with a dog, a female "sex therapist" teaching her "special methods" to a young girl, and "master-slave" sex with whips and chains. See Gov't Opp. to Pltf. Mot. for Prelim. Inj. Exh. A. Providers of dial-a-porn aggressively market their services, and they have been extremely successful. See *Carlin Communications, Inc.* v. *FCC*, 749 F.2d 113, 114 (2d Cir. 1984) (*Carlin I*) ("800,000 calls per day were made to dial-a-porn in May, 1983; 180,000,000 calls in the year ending February, 1984"). Because of the aggressive marketing, which includes leaving fliers on cars and distributing them throughout neighborhoods, young children are easily able to obtain the telephone numbers, and they make a substantial portion of all dial-a-porn calls. See 134 Cong. Rec. H1699 (daily ed. Apr. 19, 1988) (statement of Rep. Coats).

2. a. Congress made its first attempt to prevent children from gaining access to dial-a-porn in 1983, just after the dial-a-porn industry was launched. In a measure sponsored by Representative Bliley (see *Carlin I*, 749 F.2d at 115-116), Congress added a new subsection (b) to Section 223 of the Communications Act of 1934, 47 U.S.C. (Supp. III) 223(b). Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, § 8(b), 97 Stat. 1470. The provision made it a crime to use telephone facilities to make "obscene or indecent" interstate telephone communications "for commercial purposes to any person under eighteen years of age or to any other person without that person's consent" (47 U.S.C. (Supp. III) 223(b)(1)). The enactment provided, however, that it would be a defense to prosecution that the defendant restricted access to adults "in accordance with procedures which the [Federal Communications] Commission shall

prescribe by regulation" (47 U.S.C. (Supp. III) 223(b)(2)). The statute provided for criminal and civil penalties, including daily fines and up to six months' imprisonment for each violation (47 U.S.C. (Supp. III) 223(b)(1), (3), and (4)). It authorized the Federal Communications Commission (FCC or Commission) to initiate judicial or administrative proceedings to assess civil fines and the Attorney General to bring suit to enjoin violations (47 U.S.C. (Supp. III) 223(b)(4) and (5)).

b. Throughout the next four years, the FCC sought to promulgate regulations to define the safe-harbor defense to prosecution as authorized by the statute. The first set of regulations would have established a defense for those dial-a-porn purveyors that operated only between the hours of 9:00 p.m. and 8:00 a.m. Eastern Time or that required payment by credit card before transmission of the message. See *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Report and Order*, 49 Fed. Reg. 24996 (1984) (*First Report*). Explaining how the regulations sought to protect children from dial-a-porn, the Commission stated its belief that, during the specified night-time hours, "a majority of parents would be available to supervise the actions of their children" (*id.* at 25001) and that "credit cards are not routinely issued to minors without parental authorization" (*id.* at 25000).

In *Carlin I, supra*, the Second Circuit set aside the regulations and remanded them to the Commission. Although the court recognized that the government's "interest in protecting minors from salacious matter is no doubt quite compelling" (749 F.2d at 121), it concluded that the operating-hours requirement was "both overinclusive and underinclusive" (*ibid.*). It explained that the regulation "denie[d] access to adults between certain hours, but not to youths who can easily pick up a private

or public telephone and call dial-a-porn during the remaining hours" (*ibid.*). It also found no adequate explanation "why a prohibition on dial-it services is needed during daytime school hours when children are for the greater part of the year likely to be in class under adult supervision, while the prohibition is not needed after 9:00 p.m. Eastern Time (6:00 p.m. on the West Coast), when a young person needs to be unsupervised for only about ninety seconds in order to dial the number and hear the message" (*ibid.*). The court further found that the record did not adequately explain the Commission's rejection of alternative methods of restricting access, such as "screening or blocking or using access numbers" (*id.* at 122).

c. On remand, the Commission promulgated new regulations. *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Second Report and Order*, 50 Fed. Reg. 42699, 42701 (1985) (Second Report). The new regulations continued to permit prior credit card payment as a defense to prosecution. They abandoned time restrictions, however, and added instead a defense based on use of access codes, which the Commission found to be feasible and the least burdensome means of implementing the regulatory mandate (*id.* at 42705).

In accordance with the remand order, the Commission examined the options of blocking or screening telephone numbers at the customer's premises or at the telephone company offices; but it rejected those alternatives. 50 Fed. Reg. 42702-42706 (1985). So-called "exchange blocking," which blocks numbers with a specified exchange (*e.g.*, "976"), the Commission concluded, would impose substantial costs on telephone companies, requiring new equipment, software, and other measures (*id.* at 42702). Such blocking would also block *all* "dial-it" services using the exchange, including weather and sports information (*ibid.*); at the same time, dial-a-porn services could avoid

the restriction by offering their services on unblocked exchanges (*e.g.*, other than "976") (*id.* at 42702-42703). As for full "line number" (seven-digit) blocking, the technology for doing so was experimental, not yet universally available, and expensive; and it could not "handle the large number of 'dial-a-porn' systems currently in operation" (*id.* at 42703). Also, of course, "minors need only seek unsupervised telephones in residences where customers do not subscribe to the screening services to gain access to the messages" (*ibid.*).[3]

The Commission was not blind to the imperfections in its credit-card and access-code regulations. It recognized that "[n]o method guarantees that some enterprising minors will never hear the messages" (50 Fed. Reg. 42706 n.54 (1985)) and, thus, that dial-a-porn access codes and credit cards might be obtained and used by some children. It nonetheless concluded that its new regulations provided the "most effective method currently available to restrict access by minors without unduly impairing adults who want to hear the messages" (*ibid.*).

In *Carlin II, supra,* the Second Circuit upheld the Commission's rejection of blocking at the telephone company offices (787 F.2d at 853), but it remanded the new regulations on other grounds. Limiting its analysis to New York Telephone Company lines, the court concluded that the record did not support the FCC's ruling that access codes were the least restrictive means to regulate dial-a-porn (*id.* at 848, 855). The court explained that the access-code requirement in fact presented substantial problems of feasi-

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[3] The Commission rejected other options on similar grounds—*e.g.*, that they were not technologically and economically feasible, or that they were overbroad and unreasonably intrusive on adults' access (as with scrambling devices). *E.g.*, 50 Fed. Reg. 42704 (1985).

bility for the New York network (*id.* at 855), and it reasoned that the Commission had not adequately considered the feasibility of using blocking equipment at the customer's premises with the costs to be borne by the dial-a-porn providers or by the telephone companies (*id.* at 855-856).

d. In response, the FCC promulgated a third version of the regulations. *Third Report, supra.* The FCC found that, since the date *Carlin II* was decided, New York Telephone had developed a means of permitting its customers to use access codes; it therefore reinstituted the access code defense in the New York area (2 F.C.C. Rcd at 2720). The new regulations also added message scrambling to the defenses of prior credit-card payment and access-code use.

The Commission again rejected customer-premises blocking devices as too expensive and ineffective in preventing access of children to dial-a-porn, given the ease of disabling them and the ready access to dial-a-porn through the great majority of telephones that would not have a blocking device attached (2 F.C.C. Rcd at 2719-2720). By contrast, the Commission found that scrambling would not be burdensome for the message provider and would make dial-a-porn accessible only through telephones with descramblers, which themselves were not expensive; hence, having reconsidered the matter, it concluded that scrambling would be effective in reducing access to dial-a-porn by minors and could be implemented at reasonable cost (*id.* at 2720-2721). The Commission noted, however, that "absolute impossibility of access to [dial-a-porn] services by minors is not feasible" (*id.* at 2724 n.14). Moreover, the Commission acknowledged that scrambling "will not achieve the highest effectiveness unless sale of descramblers to minors is prohibited," and it therefore urged "states to exercise their authority to prohibit sale of descramblers to minors" and "[r]etailers * * * to play a re-

sponsible role concerning [such] sale[s]" (*id.* at 2722).[4]

In *Carlin Communications, Inc.* v. *FCC*, 837 F.2d 546 (2d Cir. 1988) (*Carlin III*), petition for cert. pending, No. 88-37, the court of appeals upheld the new regulations as a "feasible and effective way to serve" the "compelling government interest" in "protect[ing] minors from obscene speech" (*id.* at 555), although the court directed the FCC to reopen its proceedings if a less restrictive technology becomes available (*id.* at 556). The court ruled, however, that the statute would be unconstitutional insofar as it could be construed to restrict speech that is merely indecent rather than obscene, while suggesting that the statute need not be so construed (*id.* at 558-561). The court explained that the statute's "use of 'indecent' was clearly made with *FCC v. Pacifica Foundation*, 438 U.S. 726 * * * (1978), in mind" (837 F.2d at 558 (citing 129 Cong. Rec. H10559, 10560 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley)), but it concluded that "the *Pacifica* decision does not justify the regulation of indecent telephone messages" as opposed to broadcasting messages (837 F.2d at 560).

3. While the FCC's third regulations were under review in the Second Circuit, Congress revisited the dial-a-porn issue in light of the FCC's experience in attempting to implement Section 223(b). Congress heard testimony on both the factual and legal issues (see *Telephone Decency Act of 1987: Hearing on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1987) (*1987 Hearing*)) and concluded that there was no sufficient-

[4] The Commission also required that, if the defendant provides messages using AT&T 900 service, to obtain a defense to prosecution it must ask AT&T that its service be subject to "billing notification" – *i.e.*, an itemization on telephone bills that a particular call was to an adult message service (2 F.C.C. Rcd at 2722).

ly effective measure to eliminate the access of children to dial-a-porn short of an outright ban. In the words of Representative Bliley, who had sponsored the original enactment of Section 223(b), it had become "clear that there was not a technological solution that would adequately and effectively protect our children from the effects of this material. We looked for effective alternatives to a ban—there were none." 134 Cong. Rec. H1691 (daily ed. Apr. 19, 1988). See also *id.* at H1699 (daily ed. Apr. 19, 1988) (statement of Rep. Coats) ("it is not technologically possible to keep this information out of the hands of young people"); *id.* at H1690 (statement of Rep. Hall) ("the current regulations adopted by the FCC are not effective in stopping the spread of dial-a-porn to minors"); *id.* at S4377 (daily ed. Apr. 20, 1988) (statement of Sen. Hatch) ("if a so-called technological solution to the access of our children to dial-a-porn had been available, I, of course, would have supported it").

Accordingly, after discussing the practical and constitutional questions relevant to a prohibition of indecent and obscene commercial interstate telephone messages (see, *e.g.*, 133 Cong. Rec. S16794-S16800 (daily ed. Dec. 1, 1987); 134 Cong. Rec. H1690-H1703, H1806-H1836 (daily ed. Apr. 19, 1988)), Congress voted to broaden Section 223(b)'s express reach beyond telephone calls to minors and to eliminate the provision that permitted a defense to prosecution based on FCC regulations. Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 424.[5] As amended, Section

[5] The Senate passed the dial-a-porn prohibition by a vote of 98-0 (133 Cong. Rec. S16800 (daily ed. Dec. 1, 1987) as an amendment to the larger education bill, H.R. 5, 100th Cong., 1st Sess. § 7003 (1987) (see 133 Cong. Rec. S17048 (daily ed. Dec. 2, 1987)). The Senate subsequently agreed to the conference report on H.R. 5 as amended to

223(b) prohibits the making of "any obscene or indecent communication * * * by means of telephone * * * for commercial purposes * * * in the District of Columbia or in interstate or foreign communication." The subsections providing for criminal and civil penalties and for injunctive relief have not been changed.

4. Appellee is a major purveyor of dial-a-porn messages in California and is affiliated with Carlin Communications, Inc. Before the Section 223(b) amendments took effect on July 1, 1988, appellee brought this suit in the United States District Court for the Central District of California. Appellee sought declaratory and injunctive relief chiefly on the ground that Section 223(b)'s restrictions on obscene and indecent speech violate the First Amendment. On appellee's motion for a preliminary injunction, the district court partly agreed and partly disagreed with the contention that Section 223(b) is unconstitutional. App., *infra,* 1a-6a.[6]

In declining to issue a preliminary injunction against Section 223(b)'s prohibition of obscene telephone messages (App., *infra,* 4a-5a), the court observed that "obscene speech is unprotected by the First Amendment" (*id.* at 4a). It rejected appellee's argument that Section

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contain the identical dial-a-porn prohibition (134 Cong. Rec. S4386 (daily ed. Apr. 20, 1988)). The House approved H.R. 4401, 100th Cong., 2d Sess. (1988), which was identical to the Senate amendment to H.R. 5, by a vote of 380-22 (134 Cong. Rec. H1702-H1703 (daily ed. Apr. 19, 1988)). It then agreed to the conference report on H.R. 5 as amended to contain the provision (*id.* at H1836).

[6] Appellee also challenged Section 223(b) as vague in violation of the Fourteenth Amendment. (Presumably, appellee meant to invoke the Fifth Amendment.) The district court did not separately address any vagueness contention. It simply read the statute as incorporating the definition of "obscene" set forth in *Miller* v. *California,* 413 U.S. 15 (1973), and as using "indecent" as in *FCC* v. *Pacifica Found.,* 438 U.S. 726 (1978).

223(b) is inconsistent with this Court's ruling in *Miller* v. *California*, 413 U.S. 15 (1973), because it creates a national, rather than local, standard of obscenity. The court found applicable to the current version of Section 223(b) the Second Circuit's ruling that the 1983 version does " 'not create an impermissible national obscenity standard any more than do the federal laws prohibiting the mailing of obscene materials, or the broadcasting of obscene messages' " (App., *infra*, 4a (quoting *Carlin III*, 837 F.2d at 561)).[7]

On the other hand, the court issued a preliminary injunction against enforcement of Section 223(b) insofar as it applies to indecent speech (App., *infra*, 7a-8a), holding that Section 223(b)'s "flat-out ban of indecent speech is contrary to the First Amendment" (App., *infra*, 4a). In a very brief discussion, the court concluded that, "insofar as it applies to 'indecent' communications," Section 223(b) is "overbroad and unconstitutional" (App., *infra*, 3a). The court reasoned: although "the government unquestionably has a legitimate interest in, *e.g.*, protecting children from exposure to indecent dial-a-porn messages, § 223(b) is not narrowly drawn to achieve any such purpose" (*id.* at 4a). In thus holding Section 223(b) partly unconstitutional, the court explained (App., *infra*, 3a) that "[w]hat is at issue is the breadth to be given to *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978)," and it concluded that *Pacifica* should be narrowly read so as not to reach outside the broadcasting context to Section 223(b) (App., *infra*, 3a).

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[7] Appellee filed an application to this Court for an injunction pending appeal against enforcement of Section 223(b)'s ban on obscene telephone messages. *Sable Communications of Calif., Inc.* v. *FCC*, No. A-143. The application was denied by Justice O'Connor on August 30, 1988.

THE QUESTION IS SUBSTANTIAL

In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), this Court upheld the Commission's prohibition on the broadcast of indecent material on daytime radio, relying principally on the measure's aim of protecting children against such material. The Court emphasized the narrowness of the question it was deciding (*id.* at 750-751) and noted, in particular, that "each medium of expression presents special First Amendment problems" (*id.* at 748). This case involves telephones rather than broadcasting and a complete ban on indecent speech in the particular medium (when commercial and interstate) rather than only a daytime ban. In these respects, the case presents a question of first impression, not squarely controlled by the precise holding of *Pacifica*. The question, which involves the constitutionality of a carefully considered federal statute enacted by almost unanimous votes of Congress, is substantial and should be set for plenary consideration by this Court.[8]

Although *Pacifica*'s holding does not itself decide this case, the Court's reasoning in *Pacifica* strongly suggests that Section 223(b)'s ban on indecent speech, like the Commission action upheld in *Pacifica*, is consistent with the First Amendment. This Court, we submit, accordingly should reverse the district court's decision striking down that portion of the statute.[9] This case, like *Pacifica*, in-

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[8] The district court having held a federal statute unconstitutional in part, this Court has jurisdiction under 28 U.S.C. 1252 to review the district court's preliminary injunction. See, *e.g.*, *McLucas* v. *DeChamplain*, 421 U.S. 21, 30 (1975); *Fleming* v. *Rhodes*, 331 U.S. 100 (1947).

[9] When Congress was considering the bills that led to the enactment of the 1988 amendment to Section 223(b), the FCC General Counsel pointed out to Congress that the FCC had "consistently regarded a total ban on the dissemination of indecent, but not obscene, material

volves "indecent speech"—speech that, unlike speech on issues of public concern, is not at the "heart" or the "core" of the First Amendment (*Frisby* v. *Schultz*, No. 87-168 (June 27, 1988), slip op. 4; *Hustler Magazine* v. *Falwell*, No. 86-1278 (Feb. 24, 1988), slip op. 4). Cf. *Pacifica*, 438 U.S. at 743 (opinion of Stevens, J.) (indecent speech must "surely lie at the periphery of First Amendment concern").[10] And, like *Pacifica*, this case involves a federal

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to be beyond the bounds permitted by *Pacifica*." *1987 Hearing* at 246 (letter of FCC General Counsel). See also *id.* at 250. The FCC General Counsel also testified that "there may be serious problems in sustaining the constitutionality" of the indecency portion of what became Section 223(b) (*1987 Hearing* at 213). In addition, the United States Attorney for the District of Utah informed Congress that he was "of the opinion that an outright ban of indecent dial-a-porn messages would likely be found unconstitutional by the courts" (*id.* at 258).

Those statements—as predictions of likely judicial rulings and an acknowledgement that *Pacifica* does not by its terms cover the telephone ban at issue here, but would require an extension to reach this case—are not necessarily inconsistent with the view that Section 223(b) should be sustained as enacted. In any event, it is our position in this Court that the Court should affirm the constitutionality of Section 223(b) based on the determinations that Congress made in enacting it.

[10] The 1988 version of Section 223(b), like its 1983 predecessor, does not define the terms "obscene" and "indecent." The legislative history of both enactments, however, makes clear that Congress understood the terms as they were used in the decisions of this Court in *Miller* v. *California*, *supra*, and *Pacifica*. See 129 Cong. Rec. H10560 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley); *id.* at E5966 (daily ed. Dec. 14, 1983) (statement of Rep. Kastenmeier); 133 Cong. Rec. S16796-S16799 (daily ed. Dec. 1, 1987) (memorandum of law); 134 Cong. Rec. S4378-S4381 (daily ed. Apr. 20, 1988) (same); *id.* at H1691-H1695 (daily ed. Apr. 19, 1988) (memorandum of law); *Carlin III*, 837 F.2d at 558.

Under *Miller*, obscene speech "must, taken as a whole, appeal to prurient interest, must contain patently offensive depictions or descriptions of specific sexual conduct, and on the whole have no

effort to prevent children from gaining access to such speech through an interstate communications technology that presents special dangers of such access. Congress has a compelling interest in taking effective measures to protect children from the harmful effects of the accessibility of indecent speech to children in the home through telephones. Congress determined that there is no technological solution that could ensure that children would not gain access to telephone pornography, including obscene and indecent speech. That determination, together with the fact that adults may obtain obscene and indecent recorded messages by other means that do not pose the same danger of children's access, is sufficient to sustain Section 223(b)'s ban on commercial indecent interstate telephone communications against appellee's facial challenge.[11]

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serious literary, artistic, political, or scientific value." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). In contrast, the *Pacifica* opinion, while containing no express definition of "indecent," makes clear that the "indecent speech" that the Court held was subject to FCC regulation was speech that was patently offensive according to accepted community standards but that, unlike obscene speech, did not necessarily have a "prurient appeal." See *Pacifica*, 438 U.S. at 739-741. The Commission ruling that was upheld by the Court in *Pacifica* found the language at issue indecent because it " 'describe[d], in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience' " (*id.* at 732 (citation omitted)).

[11] Although much (perhaps most) of the speech on dial-a-porn is presumably obscene under the *Miller* standard, it has not been disputed in this case that appellee also sells indecent speech, or would do so if permitted (especially if prohibited from selling obscene speech).

Appellee challenged Section 223(b)'s ban on indecent speech on its face, and the district court found the ban overbroad (App., *infra*, 3a). This Court has made clear that facial invalidation for overbreadth is "strong medicine" to be used "with hesitation, and then only as a last resort," and is proper only if the statute has a "substantial number of

1. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944). Accordingly, this Court has long recognized that the government has a "compelling" interest in " 'safeguarding the physical and psychological well-being' " of children (*New York* v. *Ferber*, 458 U.S. 747, 756-757 (1982) (citation omitted)). The Court has explained that the First Amendment permits government regulations designed to protect children from exposure to indecent speech, even if such speech is otherwise protected. See *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 690 (1968) ("because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults"). And the Court has held that bookstores and movie theatres may be prohibited from making indecent material available to children, *Ginsberg* v. *New York*, 390 U.S. 629 (1968); radio stations may be prohibited from broadcasting indecent material accessible to children, *Pacifica, supra;* and persons may be prosecuted for distributing pornographic materials using depictions of sexually explicit conduct by children even though such materials might not be legally obscene, *New York* v. *Ferber, supra.*

2. The Court's decision in *Pacifica*, which upheld the FCC's authority to prohibit the afternoon radio broadcast of a comedy monologue containing indecent speech, is of

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impermissible applications" (*New York* v. *Ferber*, 458 U.S. 747, 769, 771 (1982) (internal quotation marks omitted)). See also *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985); *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). It is therefore not enough for appellee to show that Section 223(b)'s ban on indecent speech may have some impermissible applications.

course centrally important to evaluating the constitutionality of the congressional ban on indecent telephone speech in this case. The Court there reasoned that "special treatment of indecent broadcasting" is "amply justif[ied]" by the "ease with which children may obtain access to broadcast material," coupled with "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household.' " 438 U.S. at 749-750 (quoting *Ginsberg* v. *New York*, 390 U.S. at 639, 640). As noted, *Pacifica* itself recognized that "each medium of expression presents special First Amendment problems" (438 U.S. at 748), and this Court observed in a case concerning the use of the mails to distribute contraceptive advertising (*Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983)) that the government's interests in regulating broadcasting do "not readily translate into a justification for regulation of other means of communication." Those cautions, however, mean only that careful analysis of context is necessary before the reasoning of *Pacifica* is extended outside the broadcasting context. Here, an extension is warranted: the factors relied on in *Pacifica* fully support the ban on commercial indecent telephone communications at issue in this case.

3. Like radio and television, the telephone is a technological means by which messages come into the home and is "uniquely accessible to children" (*Pacifica*, 438 U.S. at 749). Not only is the telephone as much a fixture in modern American homes as radio and television (see U.S. Bureau of the Census, *Statistical Abstract of the United States* 523 (108th ed. 1988) (92.5% of households have telephone service; 99% have radios and 87.4% have television)); but even for young children, dialing a telephone is as easy as turning on a radio or television set. Moreover, the aggressive marketing techniques of companies like appellee make dial-a-porn telephone numbers readily avail-

able to minors. See 134 Cong.Rec. H1699 (daily ed. Apr. 19, 1988) (statement of Rep. Coats) (dial-a-porn companies "use indiscriminate marketing strategies, place fliers on windshields, indiscriminately flier neighborhoods, and spread the telephone numbers around to anyone without regard to age"). From the perspective of parents, what this Court said of indecent broadcasting in *Pacifica* applies as well to indecent telephone speech: it "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder" (*Pacifica*, 438 U.S. at 748 (citation omitted)). See also *Frisby* v. *Schultz*, slip op. 9-10.

The ability of parents to prevent their children from gaining access to indecent communications is severely restricted by the nature of telephone conversations. Monthly bills may provide some information about children's calls, but that information is limited and is received long after the calls have been made.[12] It is almost impossible (without routinely listening in on an extension) for parents to monitor their children's telephone conversations. The difficulty of parental supervision is magnified by the fact that "a young person needs to be unsupervised for only about ninety seconds" in order to hear a dial-a-porn message (*Carlin I*, 749 F.2d at 121). In addition, children can obtain access to such messages from telephones outside the home.

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[12] A parent's receipt of information in the telephone bill at the end of a month does not enable the parent to prevent or to cure the harm inflicted on children who have listened to sexually explicit messages during the month. Cf. *Pacifica*, 438 U.S. at 748-749 (footnote omitted) ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.").

The similarity of dial-a-porn providers and broadcasters is underscored by the fact that telephone sex services are typically designed so that messages can be provided to many callers at the same time. The Second Circuit observed in *Carlin II* (787 F.2d at 850) that, in New York, for example, "over 7,900 callers can be connected simultaneously to the same recorded message and the system as a whole can handle over 400,000 calls per hour." Given that capability, the dial-a-porn provider in effect "broadcasts its messages," though it uses wires, and the telephone company correspondingly "resembles less a common carrier than it does a small radio station" (*Carlin Communications, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1294 (9th Cir. 1987), cert. denied, No. 87-1479 (Apr. 25, 1988)).[13]

With respect to children, it makes no difference that a caller must voluntarily dial a telephone number in order to gain access to a dial-a-porn service, because children's voluntary dialing was the focus of congressional concern and is a legitimate object of a statutory prohibition. Children have a natural curiosity about sex and adult behavior but are "not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees" (*Ginsberg* v. *New York*, 390 U.S. at 649-650 (Stewart, J., concurring in the result)). In a very

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[13] Indeed, by using the nationwide telephone system, dial-a-porn providers free themselves of the physical constraints that limit the geographical reach of individual broadcast stations. Persons in any part of the country have the ability to call a dial-a-porn provider, while the audience of an individual radio or television station is geographically limited. One consequence of such nationwide access is that time restrictions are necessarily less effective in preventing children from obtaining access to dial-a-porn than they might be in preventing access to broadcasts, because persons in one time zone have the ability to call a provider in another.

real sense, indecent speech available on the telephone is an insidious form of "attractive nuisance" for children—a 24-hour-a-day, 7-day-a-week temptation that is available at the touch of a few buttons (or turns of a dial) at home, at a friend's house, or at any public phone booth.

In this case, Congress found that the ready availability of graphic sexual messages was having "devastating impacts on young children." 134 Cong. Rec. H1713 (daily ed. Apr. 19, 1988) (statement of Rep. Coats). See *id.* at S4377 (daily ed. Apr. 20, 1988) (statement of Sen. Hatch) (dial-a-porn is a "problem which considerable evidence has shown is detrimental to [the] physical, intellectual, and moral well-being" of children). As Representative Coats stated, "[r]ecords show that a substantial portion of the calls that are made are made by young children, children of very impressionable ages that hear graphically pornographic material that leaves a vivid impression on them. Experts have testified that such messages can cause drastic changes in behavior in some of those young people." *Id.* at H1699 (daily ed. Apr. 19, 1988).[14]

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[14] One clinical psychiatrist has noted that a child's exposure to dial-a-porn messages may lead to various psychological complications, such as premature sexual arousal, gross misunderstandings of human sexuality, and confusion about sexual values. Because children often view the telephone as an authoritative source of information, they may develop a fascination with what they hear and attempt to imitate adult behavior by acting out sexual messages with other children (Declaration of Dr. Victor B. Cline, ¶ 3.i, 3.j, attached as Exh. F. to Gov't Opp. to Pltf. Mot. for Prelim. Inj.). Congress was aware of two disturbing incidents involving children and telephone pornography in California alone. In one, a 12-year-old boy admitted having oral sex with a 4-year-old girl after hearing dial-a-porn messages on a church telephone. In the other, two boys (ages 15 and 11) sexually molested a 10-year-old girl after the three listened to dial-a-porn messages and repeated what they had heard to each other. See 133 Cong. Rec. S16794-S16795 (daily ed. Dec. 1, 1987) (statement of Sen. Helms);

In short, this case, like *Pacifica,* involves indecent speech that Congress legitimately determined to be harmful to minors. And this case, like *Pacifica,* involves a technological medium of communication that intrudes into the home and is readily accessible to minors. In these circumstances, it is just as legitimate for Congress to take special measures to prevent minors' access to such speech through the particular medium of interstate telephones as it was for the FCC, pursuant to 18 U.S.C. 1464, to take steps against indecent broadcasting for that purpose in *Pacifica.*

4. While *Pacifica* involved only a daytime broadcasting ban, Section 223(b) bans commercial interstate indecent telephone communications at all hours. Whatever the validity of such a more comprehensive restriction in the broadcasting context, a question that *Pacifica* did not reach, the ban is valid in the setting presented in this case. Congress legitimately concluded that no lesser measure would protect all children, rather than only some children, from the harmful effects of the availability by telephone of patently offensive sexual messages.

In 1983, Congress sought to preclude access by children to dial-a-porn by instructing the FCC to devise methods of removing children from the dial-a-porn audience while permitting adults to continue to obtain access to such messages. 47 U.S.C. (Supp. III) 223(b). In 1988, it revisited the issue in light of the FCC's four-year effort to promulgate effective and valid regulations. Congress came to the conclusion that access by children to phone pornography could not adequately be prevented without prohibiting telephone pornography altogether.

While lesser means might accomplish the task for the sale of adult books and movies, Congress concluded that

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see also 134 Cong. Rec. S4377-S4378 (daily ed. Apr. 20, 1988) (statement of Sen. Helms).

there is simply no "technological solution" that could sufficiently separate the audience of children from the audience of adults at the point of commercial sale—that there was no feasible way to prohibit indecent commercial telephone messages for one and not the other. 134 Cong. Rec. H1691 (daily ed. Apr. 19, 1988) (statement of Rep. Bliley) ("We looked for effective alternatives to a ban—there were none."). See sources cited at page 11, *supra*.[15] In other words, the dial-a-porn provider, like the broadcaster in *Pacifica*, "cannot reach willing adults without also reaching children" (438 U.S. at 758-759 (Powell, J., concurring in part and concurring in the judgment)). And, given the nature of the telephone system, the lesser measures proposed by the FCC in its rulemaking proceedings, effective as they might have been, could not achieve the valid end of totally precluding access by minors.

5. The district court acknowledged that the government's interest in protecting children from dial-a-porn is "unquestionably • • • legitimate," but it determined that Section 223(b)'s "flat-out ban of indecent speech" is not "narrowly drawn" to protect that interest (App., *infra*, 4a). That conclusion is incorrect. Section 223(b) does not ban all indecent speech for adults, and it is not overbroad given the access that young children have to telephones and the insufficiency of lesser measures.

First, Section 223(b) restricts the method by which indecent telephone communications may be distributed, but it does not prohibit the dissemination of such messages entirely. Intrastate messages and messages not made for commercial purposes, for example, do not come within the

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[15] In this respect, *Butler* v. *Michigan*, 352 U.S. 380 (1957), which involved the sale of a book, is quite different. In that context, means are available for reliably separating adults from children at the point of sale. In this context, Congress properly determined that no such means are available.

statute's reach. And, significantly, adults remain free to purchase recordings containing the identical messages at book or record stores, where access to minors is much more easily restricted. See *Pacifica*, 438 U.S. at 750 n.28 ("[a]dults who feel the need may purchase tapes and records • • • to hear these words"). Thus, contrary to the district court's suggestion (App., *infra*, 4a), Section 223(b) clearly does not reduce "the adult population" to hearing "only what is fit for children." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

Second, the court's conclusion that the statute is not narrowly drawn is fundamentally inconsistent with Congress's determination, based on the FCC's four-year experience receiving comments on and drafting and defending regulations, that children would continue to gain access to pornographic messages as long as commercial enterprises continued aggressively to distribute such messages over the national telephone system. That congressional determination is entitled to substantial deference. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985); *Rostker* v. *Goldberg*, 453 U.S. 57, 83 (1981). It is also supported by the FCC's observations that "[n]o method guarantees that some enterprising minors will never hear the messages" (*Second Report*, 50 Fed. Reg. at 42706) and that "absolute impossibility of access to [dial-a-porn] services by minors is not feasible" (*Third Report*, 2 F.C.C. Rcd at 2724 n.14). The pervasiveness of the access that children have to telephones means that an outright ban *is* the narrowest alternative available to prohibit access to dial-a-porn by all children.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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SEPTEMBER 1988

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 88-3353 AWT

SABLE COMMUNICATIONS OF CALIFORNIA, INC., ETC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., DEFENDANTS

[Filed July 19, 1988]

MEMORANDUM DECISION

BACKGROUND

Effective July 1, 1988, 47 U.S.C. § 223(b) was amended by the Telephone Decency Act to provide:

(1) Whoever knowingly

(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person; or

(B) permits any telephone facility under such person's control to be used for any activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(2) In addition to the penalties under paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3)(A) In addition to the penalties under paragraphs (1) and (2), whoever in the District of Columbia or in interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either—

(i) by a court, pursuant to a civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(4) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

Plaintiff, a major purveyor of 976 IAS dial-a-porn messages, has moved for a preliminary injunction (the parties having stipulated that pending the hearing, defendants will not enforce § 223(b) against plaintiff).

A concrete controversy exists. *See Sable Communications, Inc.* v. *FCC*, 827 F.2d 640 (9th Cir. 1987) (addressing challenge to pre-amended § 223(b)). In fact, plaintiff has been "chilled"—it has "softened" its messages. Since invasion of First Amendment rights is at issue, plaintiff has unquestionably met the irreparable injury requirement. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976).

INDECENT SPEECH

What is at issue is the breadth to be given to *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978). The Court concludes that *Pacifica* does not reach § 223(b); thus, that in the final analysis the statute in its present form is overbroad and unconstitutional, at least insofar as it applies to "indecent" communications.

First, *Pacifica* itself emphasized its own narrowness. *Id.* at 750-51. The narrowness of *Pacifica*'s holding was reiterated by the Court in *Bolger* v. *Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983). As the Second Circuit noted:

> *Bolger* thus singles out the broadcasting media as subject to a "special interest of the federal government in regulation" that "does not readily translate into a justification for regulation of other means of communication."

Carlin Communications, Inc. v. *FCC*, 749 F.2d 113, 120 (2d Cir. 1984) (quoting *Bolger*, 463 U.S. at 74). *See also Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985) (*Pacifica* does not apply to cable television).

This narrow reading of *Pacifica* is consistent with Ninth Circuit precedent. "The First Amendment does not permit

a flat-out ban of indecent as opposed to obscene speech; the adult population may not be reduced to 'hearing only what is fit for child[ren].' " *Carlin Communications, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1296 (9th Cir. 1987) (quoting *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957)), *cert. denied*, 108 S. Ct. 1586 (1988).

While the government unquestionably has a legitimate interest in, *e.g.*, protecting children from exposure to indecent dial-a-porn messages, § 223(b) is not narrowly drawn to achieve any such purpose. Its flat-out ban of indecent speech is contrary to the First Amendment. *Mountain States Tel.*, 827 F.2d at 1296.

OBSCENE SPEECH

On the other hand, obscene speech is unprotected by the First Amendment. *Miller* v. *California*, 413 U.S. 15 (1973). Plaintiff does not argue against this well-established proposition. Rather, plaintiff contends that § 223(b) abolishes *Miller*'s community standard requirement and, in effect, establishes a single national standard, subjecting its dial-a-porn messages to the most puritanical standard that exists anywhere in the country. The Second Circuit has already addressed this contention and found it wanting:

> We are also unpersuaded by Carlin's remaining facial constitutional challenge to section 223(b). The statute does not create an impermissible national obscenity standard any more than do the federal laws prohibiting the mailing of obscene materials, or the broadcasting of obscene messages.

Carlin Communications, Inc. v. *FCC*, 837 F.2d 546, 561 (2d Cir. 1988) (addressing pre-amended § 223(b)) (citations omitted). In light of this square holding (the amendment of § 223(b) does not affect the validity of the Second

Circuit's analysis), the Court concludes that plaintiff cannot meet even the alternative test—that a serious question is raised. *American Motorcyclist Ass'n* v. *Watt*, 714 F.2d 962, 965 (9th Cir. 1983). More importantly, if a preliminary injunction were to issue, it would mean that plaintiff would be free to transmit obscene dial-a-porn messages. Beyond doubt the public interest would be disserved by such a preliminary injunction and effect on the public interest is a factor which the Court must consider. *Id.* at 967.

SEVERABILITY

In view of these divergent conclusions on the two parts of § 223(b), the Court must next consider whether the "obscene" and "indecent" components of the statute are severable from each other—whether Congress would have enacted the one without the other. An unconstitutional provision is presumptively severable and that presumption should be applied. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984) (White, J.) (citations omitted). *See also Brockett* v. *Spokane Arcade, Inc.*, 472 U.S. 491 (1985) (applying "normal" rule of severability to First Amendment case to sever "lust" from other constitutional anti-obscenity statute). Here, no reason appears, certainly not at the preliminary injunction stage, not to apply the normal rule of severability.

CONCLUSION

For the foregoing reasons, a preliminary injunction shall issue prohibiting enforcement of § 223(b) as to any communication alleged to be "indecent." The motion for a preliminary injunction is otherwise denied.

Dated: July 19, 1988

/s/ A. Wallace Tashima

A. WALLACE TASHIMA
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 88-3353 AWT

SABLE COMMUNICATIONS OF CALIFORNIA, INC., ETC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., DEFENDANTS

[Filed July 19, 1988]

PRELIMINARY INJUNCTION

In accordance with the Memorandum Decision signed and filed concurrently herewith,

IT IS ORDERED that defendants, and each of them, and their respective officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them who receive actual notice of this preliminary injunction by personal service or otherwise, are restrained and enjoined from enforcing 47 U.S.C. § 223(b) against any allegedly "indecent" communication, including the initiation or continuation of any criminal, civil or administrative investigation, action or proceeding, pending the determination of this action on the merits.

Agreeably with the parties, no security shall be required under F. R. Civ. P. 65(c).

Dated: July 19, 1988

/s/ A. Wallace Tashima

A. WALLACE TASHIMA
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 88-3353 AWT (JRX)

SABLE COMMUNICATIONS OF CALIFORNIA, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION AND EDWIN MEESE III, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

[Filed July 29, 1988]

NOTICE OF APPEAL

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given this 29th day of July, 1988, that the defendants Federal Communications Commission and Edwin Meese III, Attorney General of the United States, hereby appeal to the Supreme Court of the United States from the order granting a preliminary injunction and accompanying memorandum opinion of this Court entered on July 19, 1988, in favor of the plaintiff and against the defendants, granting plaintiff's motion for a preliminary

injunction in part and striking down the Telephone Decency Act of 1988, 47 U.S.C. § 223(b), insofar as that statute prohibits indecent commercial telephone messages.

This appeal is taken pursuant to Title 28, United States Code, section 1252.

Respectfully submitted,

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